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**Recreational Data Services, Inc.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

RECREATIONAL DATA SERVICES, LLC,  
an Alaska Limited Liability Company,

Plaintiff,

v.

TRIMBLE NAVIGATION LIMITED, a  
California corporation, CABELA'S  
INCORPORATED, a Delaware corporation,  
AT&T MOBILITY, LLC., a Delaware  
corporation, and ALASCOM, INC., an Alaska  
corporation ,

Defendants.

Case No. 3:11-CV-00195- TMB

**MOTION TO REMAND TO STATE COURT AND TO AWARD  
ATTORNEY'S FEES AND COSTS**

Pursuant to 28 U.S.C. § 1447(c), plaintiff, Recreational Data Services, LLC ("RDS"), moves this Court to remand this action to the Superior Court of the State of Alaska's Third Judicial District at Anchorage, and for fees and costs on the basis that the Defendants filed their Notice of Removal without bona fide justification and merely for the purpose of harassment and delay. Defendants further refused to stipulate to a remand after

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prior request by the Plaintiff addressing the supporting facts and arguments outlined below. This Motion is supported by the following Memorandum, including exhibits, and the Court's record.

## BACKGROUND

1. On or about October 3, 2011 Defendants filed their Notice of Removal to (Docket 1) to remove the instant action from the jurisdiction of the Superior Court in Alaska's Third Judicial District, styled, *Recreational Data Services, LLC vs. Trimble Navigation Limited, et al.*, Case Number 3AN-11-10519CI. Plaintiff concedes that the amount in controversy exceeds \$75,000 in that it has prayed for relief in excess of \$111,666,973.00 in the State Court Proceedings.
2. Defendants sought removal pursuant to 28 U.S.C. 1441 claiming that Alascom was fraudulently joined because Plaintiff has failed to "... state a cause of action against [Alascom], and the failure is obvious according to well-settled rules of [Alaska]..."<sup>1</sup>
3. In order to bring additional issues of fact to light<sup>2</sup>, on or about October 4, 2011, Plaintiff's counsel sent an email<sup>3</sup> to counsel for the Defendants explaining the error in Defendants' removal petition and attempting to resolve the question of removal and remand amicably. Defendants refused to do so.

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<sup>1</sup> See Docket 1 at ¶ 9.

<sup>2</sup> Given the Plaintiff's urgent need to preserve its market, Plaintiff's brought suit against the defendant's quickly after learning of Trimble's launch of the infringing products and before discovery of the scope and nature of each party could be completely ascertained. Plaintiff's Complaint, although adequate for purposes of meeting Alaska's pleading requirements, additional information has come to light which will be included in future pleadings and discovery, much of which information is included herein for review by this Court.

<sup>3</sup> See email correspondence attached as Exhibit 1 regarding Plaintiff's justification and request for a stipulated remand which request was rebuffed by each Defendant.

4. There is no dispute that Defendant Alascom is an Alaska entity<sup>4</sup> which destroys this Court's diversity jurisdiction and, but for the remaining Defendants' argument<sup>5</sup> that Alascom was fraudulently joined as a Defendant, this Court lacks diversity jurisdiction in this case.

## MEMORANDUM of POINTS and AUTHORITIES

### A. Federal Courts are Courts of Limited Jurisdiction

5. Federal Courts are Courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A suit filed in state Court may be removed to federal Court if the federal Court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a).

6. Pursuant to 28 U.S.C. § 1447(c), a removed action **must** be remanded to state court if the federal court lacks subject matter jurisdiction and "[t]he burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction."<sup>6</sup>

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<sup>4</sup> See Docket 1, Notice of Removal, p. 3, ¶ 8

<sup>5</sup> As discussed below, Alascom has not joined in the petition for removal as required by 28 U.S.C. 1446(a).

<sup>6</sup> See *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999); see also *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) Holding that it is the removing party who bears the burden of establishing that federal subject matter jurisdiction exists, and all doubt must be resolved in favor of remand. (Emphasis supplied) and *Riggs v. Plaid Pantries, Inc.*, 233 F. Supp. 2d 1260, 1264 (D. Or. 2001) "The defendant also has the burden of showing that it has complied with the procedural requirements for removal."

7. According to *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), “Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”

**B. Alascom Has not Joined in Petition to Remove.**

8. Furthermore, the removing party must strictly comply with the removal statute and any doubts about the right to remove are resolved against removal and the removing party has the burden of establishing that removal is proper *Id.* at 564 and 567. In this case, defendant, Alascom, Inc., has not joined in the petition for removal as required by 28 U.S.C. § 1446(a) and the remaining defendants merely make a conclusory statement, without more, that “Alascom’s consent to removal is not required because it was fraudulently joined as a Defendant.”<sup>7</sup> However, the removal statute clearly requires that “...all defendants must join a notice of removal . . .” to support a removal to Federal Court.<sup>8</sup> “Where fewer than all the defendants have joined in a removal action, the removing party has the burden under section 1446(a) to explain affirmatively the absence of any co-defendants in the notice for removal.”<sup>9</sup>

9. Therefore, Defendants Trimble, AT&T Mobility and Cabela’s have failed to file a proper removal notice due to Alascom’s failure or refusal to join therein and this Court must remand the instant case to the Alaska Superior Court.<sup>10</sup>

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<sup>7</sup> See Notice of Removal, Docket 1 p. 6, ¶ 16.

<sup>8</sup> *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998); *also see* 28 U.S.C. § 1446(a).

<sup>9</sup> *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999).

<sup>10</sup> *Leuzzi v. Dollar Tree Stores, Inc.*, 2005 WL 2972982, \*2 (E.D. Pa. Nov. 4, 2005) (remanding case and holding that “[a]lthough it is now clear that all defendants want this case to remain in federal court, the fact that they did not comply

**C. No Fraudulent Joinder - Alascom is a Necessary Party.**

10. The Defendants joining in the petition to remove this case from State Court (the “*Removal Defendants*”) argue that Alascom was fraudulently/improperly joined merely in order to destroy complete diversity in this case. That argument, however, must fail as Alascom not only failed to join in the removal action, but it is also a necessary party to this litigation as set forth below.

11. The Removal Defendants’ argument is based on the assertion that RDS has failed to state a cause of action against Alascom, and that the failure is obvious according to the well-settled rules of the case.<sup>11</sup> Defendants go on to argue that Plaintiff has only asserted two causes of action against Alascom: breach of contract and promissory estoppel.<sup>12</sup>

Although Plaintiff’s claims against Alascom are supported under Alaska law as discussed below, the Removal Defendants mislead this Court by failing to address Plaintiff’s causes of action against Alascom for Interference with Contract (Count III)<sup>13</sup>, Punitive Damages (Count VIII)<sup>14</sup> and Specific Enforcement, Preliminary Injunction and Permanent Injunction (Count IX)<sup>15</sup> addressed in Plaintiff’s complaint. Each such cause of action, alone, is sufficient to support a claim for relief against Alascom in Alaska without regard to

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with the notice of removal’s strict statutory requirements cannot be overlooked” where removing defendant did not include consent to removal by all defendants in its notice of removal).

<sup>11</sup> *United Computer Systems v. AT&T Corporation*, 289 F.3d 756, 761 (9th Cir. 2002).

<sup>12</sup> See Docket 1, Notice of Removal, page 4 paragraph 9 from preceding page

<sup>13</sup> See RDS Complaint at Docket 1, Exhibit C, pages 8 and 9, paragraphs 43 – 48. Although Paragraph 43 purports to limit this claim to Trimble only, that was an oversight as supported by the balance of the section and fact that these charges are not limited to any defendant in the heading for each such count.

<sup>14</sup> See RDS Complaint at Docket 1, Exhibit C, pages 12 and 13, paragraphs 73 and 74. In Alaska punitive damages are permitted in intentional interference with contract claims and Plaintiff’s claims that “AT&T” interfered with Plaintiff’s partnership agreements

<sup>15</sup> See RDS Complaint at Docket 1, Exhibit C, pages 13, paragraphs 75 - 78.

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principles of contract law addressed by the Removal Defendants in their Notice of Removal. As a result, this matter must be remanded to the Alaska Superior Court as this Court lacks diversity jurisdiction.

12. With regard to the Removal Defendants' arguments that Plaintiff has no cognizable claim against Alascom for breach of contract or promissory estoppel, again those arguments must fail because the undisputed evidence is that Plaintiff had a contract with "AT&T," and initiated discussion with "AT&T" through Mr. Michael Felix, President of Alascom in August of 2009<sup>16</sup>.

13. Removal Defendants properly state the elements of a breach of contract claim and promissory estoppel claim under Alaska law; however, when applying the law of agency an agent acting with apparent authority binds the principal. See *C.A.R. Transportation v. Darden*, 213 F.3d 474 (9th Cir., 2000). In defining apparent authority the Court has stated that this authority "arises from the principle's manifestations to a third party that supplies a reasonable basis for that party to believe that the principal has authorized the alleged agent to do the act in question." *N.L.R.B. v. District Council of Iron Workers of the State of Cal. and Vicinity*, 124 F.3d 1094 (C.A.9, 1997). Finally, to determine the nature and extent of the agent's authority and whether apparent authority existed is a question of fact. *Fidata Trust Co. New York v. Community First Federal Sav. And Loan*, 946 F. 2d 898 (C.A.9 (Wash.), 1991).

14. RDS stated that it was through dealings with Mr. Michael Felix, the president of

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<sup>16</sup> See Affidavit of Brian Feucht attached hereto as Exhibit 2

Alascom, in August of 2009 that set him up with “AT&T”, whereby a reasonable belief was formed and relied on, that business was being conducted with “AT&T”. Due to the vicarious liability of Alascom, and the express terms to the AT&T NDA, RDS has not failed to state a breach of contract claim or a promissory estoppel claim against Alascom.

15. Due to the apparent authority manifested by Alascom, the joinder of Alascom to this claim is not fraudulent. Because Alascom’s joinder is not fraudulent, their citizenship should not be disregarded when determining whether diversity exists and thus creates no diversity of the parties. Complete diversity does not exist between the Plaintiff and Defendants and, therefore, removal is not proper.

#### **ATTORNEY’S FEES AND COSTS**

On October 3, 2011, defendants filed a Notice of Removal, removing this action from the Superior Court for the State of Alaska, Third Judicial District at Anchorage, Alaska. Plaintiff moves the Court to remand this action back to the Third Judicial District Court, stating that, since Alascom is a citizen of Alaska, the removal Defendants may not remove a case from Alaska state court unless the federal court has original jurisdiction. *See* 28 U.S.C. § 1441(a). Plaintiff also seeks costs and attorney’s fees, which includes the cost of admission to the United States District Court for the District of Alaska.

DATED this 27th day of October, 2011.

FRONTIER LAW GROUP, LLC

By: /s/Christopher Cyphers

Christopher D. Cyphers, Alaska Bar No. 9812085

Attorneys for Plaintiffs, Recreation Data Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2011, a true and correct copy of the foregoing Motion to Remand and for Award of Attorney's Fees and Costs was served electronically on the following:

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